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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~[illegible]~~ 101

JOSEPH I. WEST, ——— BRADLEY, AND ——— CARY, PARTNERS, AS WEST, BRADLEY & CARY, PLAINTIFFS IN ERROR,

vs.

D. B. SMITH & CO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

FILED JANUARY 24, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 328.

JOSEPH I. WEST, —— BRADLEY, AND —— CARY, PARTNERS, AS WEST, BRADLEY & CARY, PLAINTIFFS IN ERROR,

vs.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

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1, 2, 3 *Petition for writ of error.*

Circuit court of the United States, district of Connecticut.

D. B. SMITH & Co.
vs.
WEST, BRADLEY & CAREY.

To the honorable the judges of the circuit court of the United States for the second circuit and district of Connecticut:

The petition of the said West, Bradley and Carey, defendants in the above-entitled action, respectfully represent that they are aggrieved by the final judgment rendered against them in the said action upon the docket of this court, and are informed that there is error therein to their prejudice, and they are desirous that a writ of error be allowed them therefrom to the Supreme Court of the United States.

Wherefore they pray that a writ of error be allowed them returnable to the next term of the Supreme Court of the United States, and that the same may operate as a supersedeas.

WEST, BRADLEY & CAREY,
By their attorney, CHAS. E. PERKINS.

4 Circuit court of the United States, district of Connecticut.

D. B. SMITH & Co.
vs.
WEST, BRADLEY & CAREY.

Know all men by these presents that I, Charles E. Perkins, of Hartford, in said State and district, am holden and firmly bound unto D. B. Smith & Co., of New Hartford, in said State and district, in the sum of two hundred dollars, to be paid to them, their heirs, executors, administrators and assigns, to which payment, well and truly to be made, I do bind myself, my heirs, executors and administrators, by these presents.

The condition of this deed is such that whereas at a circuit court of the United States, second judicial circuit, holding sessions in for the district of Connecticut, in a suit depending in said circuit court, wherein D. B. Smith & Co. are plaintiffs, and West, Bradley & Carey are defendants, judgment was *was* rendered against said defendants,
5 and they having obtained a writ of error, and filed a copy thereof, in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit, and a citation addressed to the said D. B. Smith & Co., citing and admonishing them to be and appear at the Supreme Court of the United States at the term thereof holden on the second Monday of October, A. D. 1876:

Now, therefore, if the said West, Bradley & Carey shall prosecute their said writ of error to effect, and pay all costs if they fail to make their plea good, then this obligation to be void; otherwise to be and remain in full force and effect.

Signed and sealed this 17th day of June, A. D. 1876.

CHAS. E. PERKINS. [L. S.]

Approved.

N. SHIPMAN,
District Judge.

6 The President of the United States of America to D. B. Smith, of New Hartford, in the State and district of Connecticut, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, A. D. 1876, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the second circuit and district of Connecticut, wherein Joseph J. West, Bradley and Cary, of the city, county & State of New York, partners under the name and firm of West, Bradley & Cary, are plaintiffs, and you are defendant, to show cause, if any there be, why the judgment rendered against the said plaintiff, as in said writ mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 24th day of June, A. D. 1876.

[SEAL.] N. SHIPMAN,
One of the Judges of the Circuit Court of the United States for the Second Circuit.

7 Due and legal service of the foregoing citation is hereby acknowledged, and it is agreed that the same may be entered on the docket of the court to which it is made returnable at any time during the term thereof to which it is made returnable, as if it had been duly returned within the time limited by law.

Hartford, Conn., Oct. 19, 1876.

D. B. SMITH,
By their att'y, A. P. HYDE.

8 The President of the United States of America to the judges of the circuit court of the United States for the second circuit and district of Connecticut, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court before you, between D. B. Smith & Co., of New Hartford, in the State and district of Connecticut, plaintiffs, and Joseph J. West, Bradley, and Cary, all of the city, county, and State of New York, partners in company under the name of West, Bradley & Cary, defendants, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1876, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being
9 inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 24th day of June, A. D. 1876.

LOREN P. WALDO, *Clerk.*

The return of the judges of the circuit court of the United States for the second circuit and district of Connecticut to the foregoing writ:

The record and proceedings whereof mention is therein made follow in these words, viz:

9½ D. B. SMITH
vs.
WEST, BRADLEY & CAREY.

Be it remembered that on the 28th day of April, 1874, there was filed in court a certain record of a cause in the words and figures following, viz:

10 To the sheriff of the county of New Haven, or his deputy, or either constable of the town of New Haven in said county, and to the sheriff of the county of Hartford, his deputy, or either of the constables of the town of Hartford within said county, and to the sheriff of the county of Litchfield or to either constable of the town of Litchfield within said county, greeting:

By authority of the State of Connecticut you are hereby commanded to summons Joseph J. West, James O. West, Joseph W. Bradley, John C. Henderson, and Alanson Cary, all of the city, county and State of New York, traders and dealers in company and transacting business as such in the State of New York and Connecticut, and elsewhere, under the firm name of Wests, Bradley and Carey, to appear before the superior court to be holden at Litchfield within and for the county of Litchfield, on the second Tuesday of April, A. D. 1873, then and there
11 to answer unto Darius B. Smith, of New Hartford, in Litchfield County, State of Connecticut, in a plea of the case whereupon the plaintiff declares and says that on the first day of January, 1867, the defendants were justly indebted to Theodore Polhemus and Darius B. Smith, the said Theodore Polhemus then being in full life, but since deceased, former partners in company by the firm-name of D. B. Smith & Company, for goods before that time sold and delivered by said firm to the defendants at their instance and request in the sum of eight thousand dollars, and also in the further sum of eight thousand dollars found to be due from the defendants to the said Theodore Polhemus and Darius B. Smith, as partners aforesaid, upon an account then and there stated between them.

And also in the further sum of eight thousand dollars for work and labor done and performed by the said Theodore Polhemus and Darius B. Smith, as partners as aforesaid for the defendants at the special
12 instance and request of the defendants, and being so indebted, the defendants afterwards, to wit, on the day and year last aforesaid, at said New Hartford, assumed and faithfully promised said firm to pay to them said sum when thereto requested. Yet the defendants, though often requested, have never paid said sum to said firm nor any part thereof, nor to the plaintiff as surviving partner of the firm since the decease of the said Theodore Polhemus, all of which is to the damage of the plaintiff the sum of ten thousand dollars.

And for the recovery thereof, with just costs, this suit is brought.

(D. B. Smith is recognized in the sum of $100 to prosecute, &c.)

Hereof fail not, but of this writ due service and return make, according to law.

Dated at New Hartford this the 23d day of January, A. D. 1873.

JARED B. FOSTER,
Justice of the Peace.

13 HARTFORD COUNTY, *ss:*

HARTFORD, *February 13th*, 1873.

Then I left a true and attested copy of this writ with and in the hands of the within named Joseph J. West, one of the within named defendants.

Attest:

WESTELL RUSSELL,
Sheriff of Hartford Co.

Fees: Travel, 3.00; copy, 75; service, 12; endorsement, 12—3.99.

To the honorable superior court for the county of Litchfield, to be held at Litchfield in and for said county, on the third Tuesday of September, A. D. 1873.

The petition of Joseph J. West, James O. West, Joseph W. Bradley, John C. Henderson, and Alanson Cary, all of the city, county, and State of New York, late doing business under the firm of Wests, Bradley and Carey, respectfully represents—

That on or about the 13th day of February, A. D. 1873, Darius
14 B. Smith, of the town of New Hartford, in Litchfield County, as surviving partner of the late firm of D. B. Smith & Co., instituted his suit by action of assumpsit, demanding ten thousand dollars damages against your petitioners, returnable to the honorable superior court to be holden at Litchfield, within and for the county of Litchfield, in the State of Connecticut, on the second Tuesday of April, A. D. 1873, by the service of a writ of summons upon the said Joseph J. West, one of your petitioners, on the said 13th day of February, A. D. 1873, and while the said West was temporarily within the limits of the State of Connecticut.

That your petitioners have appeared in said suit, and the same is now pending in this honorable court.

That at the time said suit was begun and at the present time the said plaintiff was and is a citizen of the State of Connecticut, and the petitioners were and are citizens of the State of New York.

15 That the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs.

That they have made and caused to be filed in this honorable court the affidavit of the said Joseph J. West, as follows, to wit:

Superior court, Litchfield County.

DARIUS B. SMITH)
v.)
WEST, BRADLEY & CARY.)

Joseph J. West, of the city, county, and State of New York, being duly cautioned and sworn, deposes and says that he is one of the defendants in the above-entitled suit pending in this court, that the same was instituted by the service of a writ of summons upon him on the 13th day of February, A. D. 1873, and while he was temporarily within the limits of the State of Connecticut.

That the plaintiff in said suit is a citizen of the State of Connecticut, and that the affiant and all the defendants in said suit are citizens of the State of New York, and that the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs.

16 And he further deposes and says, that he has reason to believe, and does believe, that by reason of the local influence of said plaintiff in said county of Litchfield, he and the other defendants in said suit will not be able to obtain justice in said State court, in which said suit is now pending.

(Signed) JOSEPH J. WEST.

Sworn to and subscribed before me this 15th day of September, 1873.

WM. F. SETT,
Commissioner for Connecticut in New York City.

Wherefore, pursuant to the act of Congress in such case provided, the petitioners file this their petition praying this honorable court that said cause may be removed into the circuit court of the United States for the second judicial circuit, to be held at New Haven, within and for the district of Connecticut, in said circuit, on the 4th Tuesday of April, A. D. 1874, and that this court proceed no further in said

17 cause.

And the said petitioners hereby offer good and sufficient surety for their entering in said circuit court, on the first day of the session thereof, copies of the process, pleadings, depositions, testimony, and other proceedings in said suit, and doing such other appropriate acts as are by law required to be done upon the removal of a suit into the United States court, and also for their appearing in said cause when so removed to said circuit court.

JOSEPH J. WEST,
JAMES O. WEST.
JOSEPH W. BRADLEY,
JOHN C. HENDERSON,
ALANSON CARY,
By their att'y, JOHN S. BEACH.

STATE OF NEW YORK,
County of New York:

Joseph J. West, being duly sworn, says that he is one of the

18 petitioners above named; that he has read the foregoing petition and knows the contents thereof, and that the allegations thereof are true, to his best knowledge and belief.

JOSEPH J. WEST.

Sworn to and subscribed before me this 15th September, 1873.

[COM'R'S SEAL] WM. F. SETT,
Commissioner for Connecticut in New York City, No. 335 Broadway.

Superior court, Litchfield County.

DARIUS B. SMITH
v.
WEST, BRADLEY & CARY.

Joseph J. West, of the city, county, and State of New York, being duly cautioned and sworn, deposes and says that he is one of the defendants in the above-entitled suit pending in this court; that the same was institnted

by the service of a writ of summons upon him on the 13th
19 day of February, 1873, and while he was temporarily within the limits of the State of Connecticut.

That the plaintiff in said suit is a citizen of the State of Connecticut, and that the affiant and all the defendants are citizens of the State of New York, and that the matter in dispute exceeds the sum of five hundred dollars exclusive of costs. And the further deposes and says that he has reason to believe, and does believe, that by reason of the local influence of said plaintiff in said county of Litchfield, he and the other defendants in said suit will not be able to obtain justice in said State court in which said suit is now pending.

JOSEPH J. WEST.

Sworn to and subscribed before me this 15th day of September, 1873.
[COM'R'S SEAL.] WM. F. SETT,
Commissioner for Connecticut in New York City.

20 *Bond.*

Know all men by these presents that we, Joseph J. West, of the city, county and State of New York, as principal, and John S. Beach, of the city and county of New Haven, and State of Connecticut, as surety, are jointly and severally held and firmly bound unto Darius B. Smith, of the town of New Hartford, in the county of Litchfield, in the State of Connecticut, in the penal sum of ten thousand dollars, for which sum well and truly to be paid unto the said Darius B. Smith, his heirs, executors, administrators, and assigns, we bind ourselves and our heirs, executors, and administrators firmly by these presents. In witness whereof we have hereunto set our hands and seals this 17th day, A. D. 1873.

The condition of this obligation is such that if the defendants in a suit in favor of the said Darius B. Smith against the said Joseph J. West, James O. West, Joseph W. Bradley, John C. Henderson,
21 and Alanson Cary, all of the city, county, and State of New York, now pending in the superior court of the State of Connecticut, for the county of Litchfield, shall on the first day of the session of the circuit court of the United States for the second judicial district, to be held at New Haven, within and for the district of Connecticut, on the fourth Tuesday of April, A. D. 1874, enter in said court copies of the process, pleadings, deposition, testimony, and other proceedings in said suit, and do such other appropriate acts as are by law required to be done upon the removal of said cause from said superior court to said circuit court, and shall also enter their appearance as defendants in said cause in said circuit court, this bond shall be void.

JOSEPH J. WEST. [L. S.]
JNO. S. BEACH. [L. S.]

22 STATE OF NEW YORK,
City & County of New York, ss:

NEW YORK,
September 15th, 1873.

Personally appeared Joseph J. West, signer and sealer of the foregoing instrument in writing, and acknowledged the same to be his free act and deed before me.

[COM'R'S SEAL.] WILLIAM F. SETT,
Commissioner for Connecticut in New York City, 335 Broadway.

Superior court, Litchfield County, April term, 1873.

DARIUS B. SMITH
v.
WEST, BRADLEY & CARY.

Upon the pleadings and proceedings in the above-entitled cause, and on the petition of the defendants filed therein under the first section of the act of the United States of 2nd of March, 1867, it is ordered
23 that the security offered by the defendants be accepted, and that the bond filed herein approved, and that this court proceed no further in this cause, and that the same be removed into the United States circuit court in and for the district of Connecticut.

Dated at Litchfield, September 25th, 1873.

By the court.

WM. L. RANSOM, *Clerk.*

The plaintiff consents to the foregoing order, by his attorney.

Superior court, September term, 1873.

LITCHFIELD COUNTY, *ss:*

The within and foregoing is a true copy of all the papers in the within case as on file in my office.

Attest:

[SEAL OF SUP'R COURT.] WM. L. RANSOM, *Clerk.*

And on the 3rd day of July, 1874, the defendants filed in said circuit court their plea in the following words, viz:

24 United States circuit court, district of Connecticut.

D. B. SMITH & CO.
vs.
WEST, BRADLEY & CARY. } Action at law.

And now the defendants in court defend, plead, and say that they never did assume and promise in manner and form as the plaintiff has in his declaration alleged, and thereof put themselves on the jury for trial, by their attorney.

J. S. BEACH.

The plaintiff will take notice that the defendants will, if they shall deem it advisable, under the issue to be made upon the foregoing plea, offer evidence in support of the allegations contained in the annexed special plea.

And for a further plea in this behalf, by leave of the court for that purpose first had and obtained, the said defendants defend, plead
25 and say that the said plaintiff ought not to have or maintain his aforesaid action against them, because they say that the said defendants, the said copartnership firm of West, Bradley, & Cary, on the first day of August, A. D. 1865, at the city of New York, in the State of New York, entered into a written contract with the said copartnership firm of D. B. Smith & Co., of which firm the said plaintiff is the surviving partner, of the tenor and effect following, to wit:

"Articles of agreement entered into by and between West, Bradley & Cary, of the city of New York, of the first part, and D. B. Smith, of New Hartford, Connecticut, of the second part, witnesseth:

"The party of the first part in consideration of the stipulations hereinafter contained hereby agrees to furnish middlings cotton, to keep the mill of the party of the second part constantly supplied for the balance of the year, ending December 31st, 1865, to be manufactured by the party of the second part into yarns, allowing sixteen per cent. for
26 waste in manufacturing, to said yarn so manufactured into yarn from said cotton and pay for the manufacturing of the same thirty cents per pound; cash payments to be made for the manufacturing of said yarn upon the first day of each and every month.

"And the party of the second part hereby agrees to receive said cotton to manufacture the yarn into No. 24 two-threaded, twisted yarn, to twist the same as directed by the party of the first part, to return the same number of pounds of yarn as received of cotton, less sixteen per cent. allowed in manufacturing, at the price of thirty cents per pound for said yarn, with all the U. S. revenue tax added thereto, to commence delivering said yarn by the 15th of August, 1865, and sooner, if possible, to deliver not more than five thousand pounds per week, nor less than three thousand pounds per week, said yarn to be paid for in cash payments the first day of each and every month, at thirty cents per
27 pound, and U. S. revenue tax added as paid by them. Each party to pay the freights on the goods received by them severally.

"Dated at New York, this first day of August, A. D. 1865."

As by said agreement in writing, here ready in court to be seen, will fully appear.

That afterwards, to wit, on the 21st day of December, A. D. 1865, at said city of New York, said contract was continued and extended for a further term of one year from the first day of January, A. D. 1866, to the 31st day of December, A. D. 1866, by a written agreement to that effect between said parties, endorsed upon said written contract, of the tenor and effect following, viz:

"NEW YORK, *December 27th*, 1865.

"This contract is to continue for a further term of one year from the first day of January, A. D. 1866, to the 31st day of December, A. D. 1866, upon the same terms and conditions with the exception of quantity of yarn to be supplied weekly. The quantity of yarn
28 to be supplied shall not be less than 3,500 pounds weekly, nor above 4,800 pounds weekly, during said term."

As by said written endorsement, here ready in court to be seen, will fully appear.

And the defendants aver that the said several supposed promises and undertakings of the said defendants, mentioned in the plaintiff's declaration, were made, if ever made, in consideration of work and labor done by the said firm of D. B. Smith and Co. in pretended performance by them of their stipulations and agreements as set forth in said written contract, and the defendants aver that they, the said defendants, did on their part in all respects keep and perform their agreements and obligations under said written contract by them to be kept and performed, and that they did furnish to said copartnership firm of D. B. Smith
29 & Co. middling cotton in the manner and quantity, and at the time, as stipulated in said written contract, to a very large amount, to wit, to an amount exceeding in the whole thousand pounds of said middling cotton, but they aver that the said firm of D. B. Smith

& Co. did not keep and perform their agreements and obligations under said written contract, and did not manufacture said middling cotton so delivered to them by the said defendants, under said written contract, with two-threaded twisted yarn of the character, description, and value known and designated as No. 24 two-threaded twisted yarn, but utterly neglected and refused so to do, though often thereto requested by the said defendants, but on the contrary thereof the said firm of D. B. Smith & Co. manufactured and converted said middling cotton so delivered to them by the defendants into two threaded twisted yarn of a character, description, and value greatly inferior in quality and value to the two-threaded twisted yarn known and designated as No.
30 24, to wit, into two-threaded twisted yarn known and designated as numbers 20 & 21; whereby the defendants were deprived of great gains and profits, which they would have made if said middling cotton had been manufactured into two-threaded twisted yarn of the character and description as stipulated for in said written contract; and also by reason of the neglect and refusal of said firm of D. B. Smith & Co. to keep and perform their agreements aforesaid, the defendants suffered great damage, to wit, to an amount exceeding the sum of twenty thousand dollars, and greatly exceeding the amount which would be due from said defendants to said firm of D. B. Smith & Co. or to said plaintiff as surviving partner of said firm for work or labor done by said firm of D. B. Smith & Co. in manufacturing said middling cotton into two-threaded twisted yarn, if said firm of D. B. Smith & Co. had kept and performed their agreement under said written contract, and for which supposed indebtedness this suit is brought; and the
31 defendants claim to set off so much of said damages as may be sufficient to extinguish all supposed indebtedness due from said defendants to said plaintiffs for work and labor done by said firm of D. B. Smith & Co. under said written contract, and they further claim to recoup and recover from the said plaintiff the sum of twenty thousand dollars damages in excess of said supposed indebtedness so as aforesaid sustained by them by reason of the non-performance by the said firm of D. B. Smith & Co. of the agreements under the said written contract, and this they are ready to maintain and verify; wherefore they pray judgment, &c.

By their att'y,

J. S. BEACH.

And for a further plea in this behalf, by leave of the court for that purpose first had and obtained, the said defendants defend, plead, and say that the plaintiff ought not to have or maintain his aforesaid
31½ action against them, because they say that the said supposed cause of action in the said plaintiff's declaration contained and set forth did not accrue to the plaintiff at any time within six years next before the commencement of this suit in manner and form as the plaintiff in his said declaration has alleged, and this the defendants are ready to verify; wherefore they pray judgment, etc.

By their att'y,

J. S. BEACH.

32 And at the April term, 1876, the defendants filed in court their notice, in the words and figures following, viz:

U. S. circuit court, district of Conn., Sept. term, 1876.

D. B. SMITH
vs.
WEST, BRADLEY & CARY.

The plaintiff will please take notice that upon the trial of said cause the defendants will, if they shall deem it necessary, offer evidence of payment, and of accord and satisfaction as to each of the causes of action set forth in the original declaration, and in the additional count of the amended declaration, and they will also offer evidence for defense and for recoupment of the truth of the allegations contained in the special plea heretofore filed in answer to the original declarations, which, as a special plea, is withdrawn.

JOHN S. BEACH,
Att'y for Def'ts.

33 *Second count additional.*

And the plaintiff further declares for the same cause of action contained in the foregoing original declaration, and says that the defendants, on the 21st day of December, A. D. 1865, among other things undertook and promised "to furnish middlings cotton to keep the mill of the aforesaid D. B. Smith & Co. constantly supplied for the term of one year from the first day of January, A. D. 1866"; that the aforesaid undertakings and promises of the defendants were made and entered into in consideration that the said D. B. Smith & Co. then and there agreed and promised to receive said cotton, to manufacture the same into No. 24 two threaded, twisted yarn, to wit, the same as directed by the defendants, to return the same number of pounds of yarn as received of cotton, less sixteen per cent. allowed for waste in manufacturing, at the price of thirty cents per pound for said yarn, with all U. S. revenue tax added thereto, to commence delivering said yarn by the day of and sooner, if possible, to deliver not more than 4,800 lbs. weekly, nor less than 3,500 lbs. weekly, and each party to pay the freights on the goods received by them severally; that said promises and undertakings of the defendants were and are contained and set forth in a certain written contract in the words and figures following,
34 to wit, as by said written contract, ready in court to be shown, fully appears.

And now the plaintiff says that said D. B. Smith and Co. and the plaintiff kept and performed all the stipulations, conditions, and provisions contained in said contract on their part to be kept and performed. But that the defendants, though often requested and demanded so to do, have wholly omitted and refused to keep and perform the promises and undertakings as by them entered into, in this, that said defendants wholly omitted and refused to furnish cotton in sufficient quantity to keep the mill of the said D. B. Smith & Co., or the plaintiffs, constantly supplied for the term of one year from the first day of January, A. D. 1866, although the defendants were often requested so to do, as they, the said defendants, had by said contract agreed and promised to do, and the plaintiff and said D. B. Smith & Co. were obliged by reason of said neglect and refusal of the defendants to

furnish cotton in the quantity agreed upon, and did, from time to time, purchase and supply cotton to keep the said mill constantly supplied for the term of six months from the first day of Aug., A. D. 1865.

That after such purchase of such cotton from time to time so made as aforesaid by the plaintiff or D. B. Smith & Co., cotton depreciated
35 in value to such an extent that the plaintiff thereby lost the sum of three thousand dollars by reason of being so as aforesaid compelled and obliged to make such purchases, and supply such cotton, so as aforesaid omitted and refused to be supplied by the said defendants.

Bill of particulars applicable to the additional special counts.

D. B. SMITH & CO.
vs.
WEST, BRADLEY & CAREY.

Damages resulting from decrease in speed of machinery....	$7,791 70
Damages because of the inferior quality of cotton, to wit, loss of 30 cents per pound upon the amount of extra waste.	3,523 20
Extra labor.....	712 00
The above items are applicable to the 1st special count.	
Loss by depreciation of price of cotton.....	2,669 87

And at the term of said court held at New Haven, in said district, on the fourth Tuesday of April, A. D. 1876, the plaintiff, by Messrs. Hubbard & Hyde & Foster, their attorneys, duly appeared, and
36 the defendants, by John S. Beach, esq., their attorney, also duly appeared, and were at issue as aforesaid.

Wherefore the marshal of said district is commanded that he cause to come here immediately twelve, &c., by whom, &c., and who, &c., to recognize, &c., because as well, &c., and the jurors of the said jury by the marshal for this purpose empannelled and returned, to wit: Epraim S. Brown, A. C. Markham, James E. Baldwin, John Mahon, Rufus C. Dawson, Edwin Ayer, Lewis Miller, Leman H. Benton, Edgar Alvord, Mallett Seeley, William Ward, John Voorhis, being called, come, who being elected, tried, and sworn to speak the truth of and concerning the premises, upon their oath say that in this case the jury find the issue for the plaintiffs, and therefore find for the plaintiffs to recover of the defendants the sum of seven thousand nine hundred and seventy-eight $\frac{54}{100}$ dollars damages, together with his costs.

Whereupon it is considered by the court here that the issue is for the plaintiff, and that the plaintiff do recover of the defendants the sum of seven thousand nine hundred and seventy-eight $\frac{54}{100}$ dollars damages, and the further sum of two hundred and forty-six $\frac{25}{100}$ dollars costs.

And on the 19th day of October, 1876, the defendants filed in court the following bill of exceptions:

37 *Bill of exceptions.*

D. B. SMITH & CO.
vs.
WEST, BRADLEY & CAREY.

Be it remembered that on the trial of the above-entitled cause, it was proved that the parties thereto duly entered into the following written

contract on the day of , which contract expired by lapse of time on December 31, 1867.

Under this contract the defendants delivered to the plaintiffs a large amount of cotton, which was all spun into yarn by the plaintiffs, and which yarn was delivered to and received by the defendants.

The course of business between the parties was as follows: the defendants purchased the cotton in New York, which was shipped about twice per month to the plaintiffs, to whom were also forwarded invoices of the cotton. The plaintiffs manufactured the cotton into yarn, which yarn was forwarded in bags accompanied with invoices to the defendants in New York.

At the end of each month plaintiffs sent defendants an account, showing the quantity of cotton on hand at the commencement of the month, the amount which had been billed to them during the month, and the amount of yarn which had been forwarded, whether from the cotton which had been sent by the defendants or from whatever source, and a balance showing the amount of cotton purchased by the defendants, which was then on hand, or the amount of cotton which was due by the defendants in return for the delivered yarn, and the amount of yarn which the defendants should receive or the plaintiffs should furnish at the date of the account.

38

For the amount of money due to the plaintiffs for the manufactured yarn at 30 cents per pound, as shown by their accounts, they drew upon the defendants monthly. These drafts were uniformly paid until the draft for the month of December, 1866, the last month of the contract. Their account for this month shows that they had manufactured 11,270¾ pounds of yarn, upon which was due $3,381.23, and also that they had furnished over and above the amount received from the defendants 3,649 pounds of cotton during the last two months, which amounted to $1,258.91. These two amounts were not paid, but were justly due to the plaintiffs with interest, unless the matters set up in defense constituted a just defense. The defendants did not deny that said amount of yarn was manufactured and said excess of cotton was furnished by the plaintiffs.

After the contract was closed the plaintiffs brought an action of general assumpsit against the defendants and furnished to them a bill of particulars, hereto annexed, claiming the said two items and an item of $3.47 for freight, and an item of $25.00 for expenses to Newburgh, which last mentioned two items were not disputed on the trial, and also claiming an item of $157.30 for unreturned bags which contained the yarn sent to New York, and also an item of $5,413.14 for cotton furnished by plaintiffs during the year 1866 and manufactured into yarn in order to supply a deficiency which would otherwise have existed in consequence of the waste occasioned by poor cotton which had been furnished by the defendants, and which poor cotton, in consequence of its defects, was unfit to be manufactured into yarn without creating a great excess of waste above 16 per cent. This additional cotton they claimed to recover for by reason of an assessment made to that effect by the defendants.

39

Said bill of particulars was in the words and figures following:

Wesson, West, Bradley & Carey, to D. B. Smith & Co., Dr.

1866.			
Jan'y 31.	For freights on 7 sacks yarn to Tiverton, R. I....		$3 47
1867.			
"	Manufacturing 11,270¾ lbs. $\frac{2}{24}$ yarn, 30		3,381 23
"	472 bags, 1,573 yds. burlaps, at 10 cts.....		157 30
"	3,649 lbs. cotton short, which cost 34½		1,258 91
"	Services of D. B. Smith to Newburgh, N. Y.....		25 00
"	13,990 lbs. cotton furnished the defendants and manufactured into yarn, which yarn was sent to and received by the defendants, not included in any of the above items, or to 11,744 lbs. yarn sent the defendants, for which the defendants did not furnish cotton		5,413 14
			$10,259 05

40 Interest on all above items from Jan'y 1, 1867.

Upon the day of the trial the plaintiffs, having theretofore given the defendants notice of their intention so to do, and having furnished to them a copy of the two counts hereinafter mentioned, asked leave of the court to file two additional special counts.

The practice of the circuit court for the district of Connecticut is in accordance with the statute of the State of Connecticut, regulating the practice of the State courts in regard to amendments, which statute and the practice thereunder is to the effect that the plaintiffs may amend any mistake, defect or informality in the declaration, not changing the form or ground of the action, or insert new counts in his declaration for the same cause of action as that declared upon in any of the original counts, at any time, on the payment of costs, at the discretion of the court.

The defendants objected to the allowance of said amendments upon the ground that they were not for the same cause of action as that declared upon in any of the original counts. The court disallowed one of said counts and admitted the second count, the said count being heretofore inserted in the record of this cause, to which ruling and allowance of said second count the defendants then and there duly excepted.

41 The defendants denying that anything was due upon the disputed items, claimed to recoup against the admitted items the amount of damages to them arising from the alleged fact that the yarn which was manufactured was No. 20 or No. 21 instead of No. 24, as called for in said contract.

The defendants, who were tape manufacturers, and procured the yarn for the purpose of making tapes, offered evidence tending to show that at the time of the completion of said contract they had on hand 42,834 pounds of yarn which had not been woven into tapes; that they then, for the first time, tested any of the yarn which had been manufactured, and discovered that it did not exceed Nos. 20 or 21; that those numbers were a coarser yarn than No. 24, made a heavier and thicker tape and a less number of yards than No. 24; and that if the whole yarn was No. 20 or 21, they had been seriously damaged.

One of the defendants also testified that they had not tested the yarn as it was received and manufactured into tapes, because they relied upon the assertion of the plaintiffs that it was No. 24.

The plaintiffs offered evidence tending to show that the yarn was fully equal to No. 24, especially the said 42,834 pounds; that in the earlier part of the time covered by the contract they were requested by the defendants, as their business was driving, and they could use all
42 the yarn that they could buy, to send them whatever yarn they (the pl'ffs) could manufacture, although not as fine as No. 24; that if any yarn was sent below No. 24, it was well known to the defendants, who accepted the same with knowledge of its defects.

The following letters were introduced in evidence by the defendants for the purpose of showing that the plaintiffs, by their letter of Feb. 13, 1867, admitted the claim of the defendants in regard to the size of the yarn:

NEW YORK, ~~July~~ *23d*, 1867.

Messrs. D. B. SMITH & Co.:

GENTS: To our great surprise we find, upon examining thirty-two bags of yarn from you out of about as many invoices—we find they only number in size averaging less than 21 instead of number 24, as they should be. Now if all we have had of you has been the same, it makes it very damaging to us, for No. 24 was the very lowest we could use advantageously, and we always, you know, was anxious to have you make, if possible, No. 26 instead. We send you by express the sample skeins taken promiscuously from 32 different bags, with tickets of real No. as we find them. You can see for yourself, and, if you like, you can
43 come and examine the balance, and we presume you will willingly make good to us the damage and difference between it and No. 24 yarn, as agreed upon. Please let us hear from you at once; and if you come down, please bring with you the sample skeins we sent you by express, and also the memorandum. We are extremely sorry about it, but presume you will make it right, as far as possible, with us.

Truly yours,

WEST, BRADLEY & CARY.

NEW YORK, *Jan'y 31st*, 1867.

Messrs. D. B. SMITH & Co.:

GENTS: Your favor 25th inst. is rec'd. You speak about having samples of skeins yarn sent running from No. 23 to No. 25¾. We have not examined the Nos. of your yarn sent us particularly until recently, and, as we wrote you, we were surprised to find them running less than No. 21 on an average, and sent you samples of it taken from over 30 different bags and a great number of different invoices. We pay you a liberal price for making us full No. 24 two-ply, as per contract, and as we find your yarn so much coarser, and so different from what we wish, feel that you ought to make good to us the damage it really
44 is to us. You can examine particularly the samples we sent you by express; also we would like you to look through all we have on hand made by you for us. We feel that you will willingly do us justice in the matter, and that is all we ask from you. Please come and see us and the yarn, or write us what you think you ought to do in the matter.

We feel very sorry, for we have always been very anxious to us' two-ply 26 instead of No. 24; No. 20 and No. 21 we would not use at all if we could help it.

Awaiting to see you or hear from you,

Truly yours,

WEST, BRADLEY & CARY.

P. S.—If you come down, please bring the samples of yarn we sent you by express.

NEW YORK, *Feb'y 6th*, 1867.

Messrs. D. B. SMITH & Co.:

GENTS: Your favor 1st inst. is received and contents noted. All we can say is that the yarn you have sent us is entirely too coarse for our advantageous use. You know we have often stated to you that full No. 24 was coarser than we liked or was profitable for us to use, and urged you repeatedly, if you could do so, to make it No. 26, and we
45 would willingly pay the difference in manufacturing. We would not knowingly had yarn made as coarse as No. 21 at hardly any price, for it isn't profitable for us to use and make our tapes and covering very undesirable in comparison to what No. 24 yarn would make. It makes it very bad for us, and we think you should allow us at least five cents per pound. We would not purchase that No. for ten cents per pound less for our use. We are very sorry indeed to find it so. If you are coming down here soon, we would like to see you. Perhaps you can make us full No. 24 yarn in exchange for what we have on hand. We would like it much if you could do so. We will do all we can to make it right and just, and we presume you will do the same.

Awaiting your reply,

Truly yours,

WEST, BRADLEY & CARY.

NEW YORK, *Feb'y 27*, 1867.

Messrs. D. B. SMITH & Co.:

GENTS: We find we have of yarn made by you on hand 242 bags, 42,834 lbs. All appears about as samples sent you. We presume all the yarn you have made for us has been several numbers coarser than No. 24, and we are very sorry that we did not detect it at first, as
46 it has been a great loss to us all through. Knowing as you did, that full No. 24 was even coarser than we preferred to use, frequently urging you to make it, if possible, for us No. 26 instead, and willingly offering to pay you the difference in expense between 24 and 26 if you would do so, not doubting for a moment that you would under any circumstances make it a shade coarser.

We think to make us, as we remarked to you before. We would not purchase for our use the sized yarn you sent us and give as much into 10 cents per pound as we would give for full No. 24. We hope you will see that we wish to do what is right and just with you, and under the circumstances be as liberal towards you as possible.

Truly yours,

WEST, BRADLEY & CAREY.

Messrs. Wests, Bradley & Carey to D. B. Smith & Co., Dr.

1866.		
Dec. 31st, to manufacturing 11,270¾ lbs. yarn at 30c	3,381	23
" to 3,649 lbs. cotton at 34½c	1,258	91
" to 472 bags	157	30
" to services D. B. Smith to Newburgh	25	00
	$4,822	44
Less damages claimed	2,141	70
Balance due	$2,680	74

NEW HARTFORD, *Feb. 13th*, 1867.

47 Messrs. WESTS, BRADLEY & CARY:

SIRS: Yours of the 27th inst. is at hand claiming damages of 5 c. per lb. on 42,834 lbs., which we deduct from the bill, leaving a balance due us of twenty-six hundred and eighty $\frac{74}{100}$ dollars, which we have drawn on you at sight in favor of H. A. Redfield, cashier Phœnix Bank, Hartford.

Yours, truly,

D. B. SMITH & CO.

The plaintiffs, for the purpose of rebutting any alleged admissions contained in the letter of Feb. 13, called upon the defendants to produce the plaintiffs' letters written in reply to the said letters of the defendants. Said letters not having been produced, and having been mislaid or lost, and no copies having been kept by the plaintiffs, they gave parol evidence of their contents, the substance of which was a denial of the assertion of the defendants that the yarn was below No. 24, and a recital of the tests which the pl'ffs had made to prove that it was equal to that number.

Upon the examination of D. B. Smith, the surviving member of the pl'ff's firm, and the writer of the letter of Feb. 13, 1867, he was asked by his counsel whether he intended in and by said letter to
48 admit that the def'ts' claim for damages was valid, and that the yarn was below No. 24, to which question counsel for defendant objected, which objection was sustained by the court.

The court then permitted the witness, against the objection of the defendants, to be asked whether his acceptance of the defendants' proposition to deduct five cents per pound from the 42,834 pounds was because he admitted that the yarn was not according to contract, or to settle a controversy. No objection was made to this, but its admission was objected to upon the ground that said letter must explain itself. To the ruling of the court overruling said objection the counsel for defendants then and there excepted.

The witness replied that he accepted the proposition because he did not wish to be obliged to commence a lawsuit in New York City and endure the expenses of a trial in the courts of that State.

The plaintiffs offered evidence tending to prove that defendants did not pay the draft named in said letter of Feb. 13, and afterwards demanded the same reduction upon all the yarn which had been previously manufactured and delivered to them.

It was admitted that the difference between No. 20 and No. 24 could not be detected by the eye, before it was manufactured into tapes.

49 The court charged the jury that parties who receive goods manufactured for them under a contract have a reasonable time within which to examine and accept or reject them, and if the goods are accepted with knowledge of their defects the acceptors are precluded from afterwards making claim for damages.

If the defects are discernible by the ordinary means of inspection and examination the part' receiving the goods is bound to make such inspection and examination within a reasonable time, and if he delays an unreasonable time and uses up or keeps the goods without complaint, such a retention of the goods after the lapse of a reasonable time is an acceptance.

The defendants requested the court upon this part of the case to charge the jury that if the non-examination by the defendants was caused by a reliance upon the declarations of the plaintiffs that the yarn was being made in accordance with the contract, a retention of the

goods under such circumstances without examination would not be an acceptance.

The court charged that the rule in regard to acceptance which had been laid down would not apply in case the plaintiffs had hoodwinked the defendants, or had fraudulently concealed the facts for the
50 purpose of deceiving, and which did deceive the defendants; to which part of the charge the defendants then and there excepted.

The jury were then instructed that any and all questions in regard to an acceptance by a retention of the goods without examination, or neglect or delay to examine, might be laid out of the case as immaterial, for the plaintiffs had waived this question of fact, and had placed their case entirely upon two grounds: 1st. That the goods were free from defects, and were made in compliance with the contract; and, 2nd. That if there were any defects, that the defendants had accepted the goods with full actual knowledge of the defects, and that to these two questions only the jury were to direct their attention, and consideration of other questions was withdrawn. And if they found that the yarn was not No. 24, and had not been accepted with knowledge that it was below 24, then the rule of damages was given by which they were to be guided.

The jury returned a verdict for the plaintiffs, and inasmuch as the said several matters do not appear by the record, the defendant's counsel request the presiding judge at said trial to allow and sign this bill of exceptions, which, in pursuance of said request and of the statutes in such case provided, is done, and said bill of exceptions con-
51 taining the several matters aforesaid is allowed and signed as of the term of the court aforesaid, to wit, the April term of said court, A. D. 1876.

[L. S.] N. SHIPMAN, *Judge.*

I, Loren P. Waldo, clerk of the United States circuit court for the second circuit and district of Connecticut, do certify that the foregoing is a true and correct copy of the record and proceedings on file and remaining of record in said court in the cause lately pending therein entitled D. B. Smith & Co. vs. West, Bradley & Carey.

In testimony whereof I have hereunto set my hand and the seal of said court, at Hartford, in said district, this 18th day of January, A. D. 1877.

[SEAL.] LOREN P. WALDO, *Clerk.*

(Indorsement on cover:) No. 328. Joseph I. West, Bradley and Cary, partners as West, Bradley and Cary, plaintiffs in ereor, vs. D. B. Smith & Company. Connecticut, C. C. U. S. Filed 24th January, 1877.

REC. 328—2

Supreme Court of the United States.

BRIEF OF MR. PERKINS,

Counsel for Plaintiff in Error.

WEST, BRADLEY & CAREY,

Plaintiffs in Error,

vs.

D. B. SMITH & CO.,

Defendants in Error.

No. 101.

October Term, 1879.

In Error from Circuit Court of the District of Connecticut.

Supreme Court of the United States.

OCTOBER TERM, 1879.

No. 101.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

WEST, BRADLEY & CAREY, PLAINTIFFS IN ERROR,

vs.

D. B. SMITH & CO., DEFENDANTS IN ERROR.

BRIEF OF MR. PERKINS, OF COUNSEL FOR PLAINTIFF IN ERROR.

Statement of Case.

In 1873, D. B. Smith & Co. brought an action at law against West, Bradley & Carey, returnable to the Superior Court for the County of Litchfield, State of Connecticut. The declaration was in general assumpsit, containing three of the common counts, viz.: One for goods sold and delivered, one for an account stated, and one for work and labor done and performed.

The defendants applied to have the case removed into the United States Circuit Court for the District of Connecticut, held on the fourth Tuesday of April, 1874, and it was so removed and entered in that court, and was continued from time to time until the April term, 1876, when it was tried.

On the day of the trial the plaintiff asked to be allowed to amend the declaration by the insertion of two additional counts in special assumpsit. The defendants objected, and the court refused to allow one of the counts, but allowed the second one, which is set out in full on p. 10 of the Record.

The defendants duly excepted to this ruling, and this will be the first question to be considered.

Upon the trial of the cause it became a question whether or not certain yarn made by the plaintiffs for the defendants was according to contract. To show an admission by the plaintiffs that it was not, the defendants put in evidence a letter of the plaintiffs to the defendants, dated February 13, 1867, which is printed on page 16 of the Record, admitting the damages claimed, and agreeing to deduct them. The plaintiffs' counsel asked the person who wrote the letter whether he intended thereby to admit that the defendants' claim for damages was correct. To this question the defendants objected, and it was ruled out (page 16) of Record. The plaintiffs' counsel then asked him whether he made the deduction as shown in the letter *because* he admitted that the yarn was not according to contract, or to settle a controversy. This question was also objected to, but was admitted by the court, and the defendant excepted.

Assignment of Errors.

The errors claimed are, therefore,

1. That the court erred in allowing the new count to be filed.

2. It erred in admitting parol evidence of the plaintiffs' intention in writing the letter of February 13, 1867.

Points.

I.

The court should not have allowed the new count to be filed, because it was an entire change of the ground of action.

I am aware that in this court under the former statutes of jeofails amendments were held to be matters of discretion, and therefore not the ground of error.

Those, however, were cases of amendments which were authorized by those statutes, and no doubt if the inferior court allowed an amendment which the statute did *not* authorize, and was not within its discretion, error lies for such allowance.

If it becomes necessary for the court to consider that question, I urge that under those statutes the Circuit Court could only allow amendments of form, but its power did not extend to allowing under the pretence of amendment, an entirely new and distinct cause of action to be instituted in the count, any more than the introduction of a new party, or the substitution of a new form of action.

The broadest statute only allows "amendment of process," not the substitution of another process founded on a different cause of action, making an entirely new suit.

Where process of mesne attachment is allowed, as in Connecticut, it would be most unfair and unreasonable towards subsequent attaching creditors, mortgagees, and others, to have a dozen new and distinct causes of action brought into the court after the rights of all parties had become fixed and moneys advanced on the ground that nothing was due on the cause of action on which the suit was originally brought.

I believe this question has never been passed upon by this court, and if it becomes necessary I hope they will give it a careful examination.

But I apprehend that under the Practice Act of 1872 this question is to be governed, as the court below held, by the rules of practice in Connecticut courts.

That act provides that the "practice, pleadings, and modes and forms of proceeding" in the State courts shall be followed in the United States courts, in actions at law.

This law was intended "to bring about conformity in the law of procedure in the federal and State courts of the same locality."

Nudd *vs.* Burrows, 1 Otto, 426 (441).

"The act of Congress requires the Circuit Court to conform to the mode of pleading of the State in which the court sits."

Phillips *vs.* Seymour, 1 Otto, 646 (655).

"Where a State law has prescribed the subsequent proceedings of pleading or practice to raise the issues of law or fact in the case, such law is *undoubtedly obligatory* upon the courts of the United States in that locality."

Indianapolis R. R. Co. *vs.* Horst, 3 Otto, 291 (300).

Sawin *vs.* Kennedy, 3 Otto, 289.

Clearly the power of amending by adding new counts for a different cause of action is a part of the practice, and modes, and forms of procedure, as much so as the power of joinder of counts originally.

If the State law prohibited joining counts for different causes of action, either originally or by amendment, the federal courts would be equally bound by each prohibition.

The learned court below states in the bill of exceptions (page 13 of Record), that the practice of the State courts as to amendments has been adopted in the Federal courts for the District of Connecticut, which prevents any claim that the practice act provides for conformity only "as near as may be."

The question therefore arises what is the rule in Connecticut as to amendments?

The learned court below (page 13 of Record), states it to be that new counts may be filed at any time, not changing the form or ground of action.

This is correct. The Statute provides, "the plaintiff may amend any defect, mistake, or informality in the writ, citation or petition not changing the form or ground of action, *or insert new counts in his declaration for the same cause of action as that declared upon in any of the original counts*," *etc.*

Statutes of Connecticut, revision of 1875, p. 426, § 1.

This was the rule in Connecticut under the old statute which was like the English and United States statutes.

Peck *vs.* Sill, 3 Conn., 157.

It has often been held in Connecticut that courts have no power to allow an amendment by new counts or otherwise changing the ground of action.

Baldwin *vs.* Walker, 21 Conn., 180.
Windham *vs.* Litchfield, 22 Conn., 231.
Spencer *vs.* Howe, 26 Conn., 201.
See also other Connecticut cases hereinafter cited.

It has also been held that as the court has no power to allow such an amendment, its allowance is not an exercise of discretion, and is a ground of error.

Merriam *vs.* Langdon, 10 Conn., 472.
Hollister *vs.* Hollister, 38 Conn., 180, and other Connecticut cases cited.

The only remaining question, therefore, is whether the new count allowed to be filed here was "for the same cause of action as that declared upon in any of the original counts."

The meaning of this expression, same cause or ground of action, is well settled in Connecticut.

In Nash *vs.* Adams, 24 Conn., 33, on page 39, the court says, "The phrase ground of action is not used in this statute in any technical or narrow sense, but was intended to refer rather to the *real object of the plaintiff in bringing the suit.*"

In that case the action was brought for the non-delivery of certain gold which the original declaration in one count alleged was entrusted to the defendants as carriers between Norwich and Philadelphia, and in another to the defendants, without stating in what capacity. It was held that new counts only changing the averments as to the time and manner of receiving the same gold, and alleging the defendants to be carriers between Norwich and New York, did not change the ground of action, as that was, the non-delivery by the defendants of gold entrusted to their care.

Spencer *vs.* Howe, 26 Conn., 201, was an action for the breach of a convenant against incumbrances in a deed. The original declaration alleged a particular breach, and the Court allowed a new count to be filed alleging a different breach *of the same covenant*, saying: "Now the ground of action in this case may, we think, be fairly considered as the breach of the covenant against incumbrances, *and so long as the amendments are confined to mere specifications of this breach* they are such as the Court is justified in allowing under this beneficient statute."

In Beers *vs.* Woodruff, 30 Conn., 308, the declaration contained two counts, one for false warranty in the manufacture and sale of a boiler, and one for fraud in the same manufacture and sale. The Court allowed a new count setting up negligence in manufacturing and selling the same boiler, on the ground that the ground of action was the tortious acts of the defendants in the making and selling that boiler, so the ground of action was the same.

In Church *vs.* The Syracuse Salt Co., 32 Conn., 372, the Court discusses the subject quite fully. The original count alleged that the defendants induced the plaintiff to make a

contract for the purchase of a lease of some lands by a false representation of the value of the lands, and the plaintiff moved to amend by inserting a new count avering that the false representation covered also statements as to the value of coals, *included in the same purchase*. The Court held it was only a full statement of the same transaction which had been only partially stated before, and allowed it, but they say on page 376, "If the amended counts presented the case supposed by the defendants' counsel in their brief of sundry tortious acts in making divers falseand fraudulent representations, respecting entirely different matters, having no necessary connection with each other . . . divers tortious acts several and distinct in their nature, the claim of the defendants would be correct." And again on page 377, "We are satisfied that neither count embraces, as amended, new and distict matter upon which an independent suit could be brought."

In Howland *vs.* Couch, 43 Conn., page 47, the Court states the rule to be that the new count must be founded upon "the same transaction" as the old.

Now in the case at bar, it is apparent that the "cause of action" set up in the new count is different in every respect from either of the old counts.

Those are, account stated, goods sold, and work done.

The new count sets out a special contract by the defendants to furnish cotton for the plaintiffs' mill, and to keep it constantly supplied for a year; that they did not perform that contract inasmuch as they did not so furnish cotton as they had agreed, and in consequence the plaintiffs were damaged, which damage is specially alleged to consist of having to keep

the mill supplied themselves, and that the cotton so bought by them depreciated on their hands, etc.

See Record, pages 10–11.

It does not seem necessary to argue that this cause of action, the breach of a special contract by refusing to furnish cotton, is different from a liability arising from a statement of account, from selling goods or doing work.

Nothing can be more dissimilar than an action to recover for goods sold by the plaintiff to the defendant, and an action to recover because the defendant *did not* deliver goods to the plaintiff.

One is the breach of an executory contract, the other is the failure to pay for the execution of a different contract.

There is no connection whatever between the two.

Duhl *vs.* McGlue, 2 Rawle, 337.

The same construction is adopted in other States.

In Ball *vs.* Clafflin, 5 Pick., 303, the court says on p. 305, "It must be for the same cause of action, that is, the subject matter of the new count must be the same as of the old. It must not be for an additional claim or demand, but only a variation of the form and of demanding the same thing."

Cassell *vs.* Cooke, 8 Serg. & Rawle, 287.

Eaton *vs.* Ogrer, 2 Maine, 46.

Thompson *vs.* Phelan, 22 N. H., 339.

I submit, therefore, that the allowance of this new count was error.

II.

As to the admission of the plaintiff's statement as to the meaning of the letter.

It will be admitted that the plaintiff could not be asked whether he intended by the expressions used in the letter to admit a liability for damages.

This question was asked and ruled out on the ground that it was an attempt to give a construction to the words of the letter by parol evidence of what the plaintiff now says he means by the words used.

The force and meaning of the letter is for the trier to find. The position and circumstances of the parties are admissible to enable him to stand in the place of the writer, but to ask the writer what meaning he intended to convey by the words is clearly inadmissible.

Brown *vs.* Slater, 16 Conn., 196.
Bigelow *vs.* Collamore, 5 Cush., 230.

But the second form of the question is substantially the same thing. The object of the question and answer was to make the jury believe that the plaintiff, by what he wrote, did not *mean to admit any liability*.

"It seems to be well settled that the rule excludes all evidence of intention, whether direct or inferential."

1 Green on Ev., § 282a, p. 319.

That is exactly what the law will not allow him to do, and it makes no difference in what form of words the question is clothed.

Suppose the question came up in the jury-room whether this liability existed. One juror would say, "The plaintiff has admitted his liability by the letter." Another one would

say, "Oh, no; he says he did not mean to admit any liability, but only offered to pay it to avoid a lawsuit."

The necessary effect of the evidence is to turn the minds of the jury from the letter itself to the plaintiff's statement of what was in his mind at the time of writing it.

The only question in this part of the case was, whether this letter admitted a liability; that question must be settled by the letter itself, and parol evidence that the writer did not by accepting the proposition *intend* to admit any liability, or that he did not accept it *because* he admitted the liability is equally objectionable.

In either case the jury are likely to be misled from the real question.

Saying that the reason why he wrote what he did was *not* that he admitted it, is only stating his intent in a negative form.

If the plaintiff intended to convey the idea by his letter that he agreed to pay the damages only because he did not want a law suit, or that he did not admit any liability by the offer, he should have said so in the letter.

This is endeavoring by parol evidence to limit and modify, and indeed to entirely change and add to the words of the letter.

The general rule as laid down by Taylor on Evidence, section 1087, 1088, clearly expresses the reason for it.

§ 1087. "But although evidence of all the circumstances which surrounded the author of a written instrument will be received for the purpose of ascertaining his intentions, yet those intentions must be ultimately determined by the language of the instrument, as explained by the extrinsic evidence; and no proof, however conclusive in its nature, can be admitted with the view of setting up an intention incon-

sistent with the known meaning of the writing itself. For, the duty of the court in all these cases is to ascertain, not what the parties may have really intended, as contradistinguished from what their words express; but simply, what is the meaning of the words they have used. It is merely a duty of interpretation; that is, to find out the true sense of the written words as the parties used them; and of construction, that is, when the true sense is ascertained, to subject the instrument to the established rules of law.

§ 1088. "In no case therefore, except as will be presently pointed out, where the description in the document would equally apply to any one of two or more subjects, or where the object is to rebut an equity, is it permitted to explain the language of a written instrument by evidence of the *private views, the secret intentions, the known principles, or even the express parol declarations of the writer;* but, in all cases alike, the court must expound the instrument in strict accordance with the language employed; and if the primary meaning of this language be unambiguous, both with reference to the context and to the circumstances in which the parties to the instrument were placed at the time of making it, such primary meaning must be taken conclusively to be that in which the parties used the language, and no extrinsic evidence can be received to show that in fact they used it in any other sense, or had other intention."

In the case at bar the defendants in their letter claim damages, and the plaintiff agrees to pay them, and the defendants claim that this is a written admission of the existence of damages.

The defendant admits that it is, so far as appears from the letter, but says it must be construed by the "private views, the secret intentions" of the writer, and those private views were that he did not write the letter, "because" he intended to admit or did admit damages claimed.

He endeavors to destroy the plain meaning of the words and

give them an entirely different meaning, by testifying to the secret reason which existed in his own mind for writing the letter and agreeing to pay the damages.

If this is not allowing parol evidence of intention outside of a written instrument to add to modify and control its meaning, I do not see what can be.

I submit, therefore, that the judgment should be reversed, both for the error in pleading and for that in the admission of improper testimony.

C. E. PERKINS,
Of counsel for the Plaintiff in Error.

Supreme Court of the United States.

NO. 101.

WEST, BRADLEY & CARY,

PLAINTIFFS IN ERROR,

vs.

D. B. SMITH & CO.,

DEFENDANTS IN ERROR.

BRIEF OF DEFENDANTS IN ERROR.

A. P. HYDE, Counsel.

Supreme Court of the United States.

WEST, BRADLEY & CARY,
PLAINTIFFS IN ERROR,

vs.

D. B. SMITH & CO.,
DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS IN ERROR,

BY A. P. HYDE, COUNSEL.

This suit is an action of assumpsit.

It was commenced by writ and declaration, with general counts only, dated the 23d of January, 1873, served Feb. 23, 1873, and returnable before the Superior Court, in Litchfield county, Connecticut.

At the September term of said Superior Court, A.D. 1873, the defendants appeared and removed the cause to the Circuit Court of the United States, within and for the District of Connecticut. (See Record, pages 3, 4, 5, and 7.)

After said cause had been so transferred and entered in the docket of the Circuit Court, the defendants, on the 3d day of July, A.D. 1874, filed their plea of the general issue, with notice of special defence, under the practice of Connecticut. In this notice the defendants set up a special contract between plaintiffs and defendants, claiming that the supposed

indebtedness for which the suit was brought arose under that contract, and claiming that plaintiffs had not fulfilled the contract, and asking that the damages for such non-fulfillment of the contract might be set off against the plaintiffs' claim. (See Record, pages 7, 8, and 9.)

At the April term of said Circuit Court, A.D. 1876, the plaintiffs filed an additional count to his declaration (see Record, pages 10 and 11), which was allowed. Also another count, which was not allowed. (See Record, page 13.)

The count allowed set up the special contract, claiming performance by the plaintiffs, and damages from defendants for non-performance.

The bill of particulars on which the case was tried appears on page 13 of Record.

The items in dispute appear on page 12 of the Record.

The first question raised by the defendants under their writ of error, as we understand it, is that the court erred in allowing the plaintiff to amend his declaration by inserting this additional count.

The action of the court in allowing the amendment appears on page 13 of the Record, as follows:

"Upon the day of the trial, the plaintiffs having theretofore given the defendants notice of their intention so to do, and having furnished to them a copy of the two counts hereinafter mentioned, asked leave of the court to file two additional special counts.

"The practice of the Circuit Court for the District of Connecticut is in accordance with the statutes of the State of Connecticut regulating the practice of the State courts in regard to amendments, which statute and the practice thereunder is to the effect that the plaintiffs may amend any mistake, defect, or informality in the declaration not changing the form or ground of the action, or insert new counts in his

declaration for the same cause of action as that declared upon in any of the original counts, at any time, on the payment of costs at the discretion of the court.

"The defendants objected to the allowance of said amendments upon the ground that they were not for the same cause of action as that declared upon in any of the original counts. The court disallowed one of said counts, and admitted the second count," etc.

The statutes of Connecticut allowing amendments have been changed from time to time.

The first statute, passed in 1794, remained substantially the same till 1855, and was as follows (see Statutes, Revision of 1854, page 85):

"The plaintiff may amend any defect, mistake, or informality in the writ or declaration, without cost, within the three first days of the term of the court to which it is returnable, and at any time afterwards on the payment of cost at the discretion of the court: provided, such amendment shall not change the form or ground of the action, and the defendant shall have reasonable time to answer the same."

In 1855 the following provision was added, extending the right to amend (see Stat. of Conn., Revision of 1866, p. 28):

"In actions of trespass and trespass on the case, the plaintiff may at any time amend his writ or declaration by the addition of new counts in either trespass or case: and in actions of assumpsit, debt, or covenant by the addition of new counts in either assumpsit, debt, or covenant, when such new counts are for the same cause of action as either of the original counts in the declaration: and when such amendment is made within the first three days of the court to which the writ is returnable, it may be made without cost, and afterwards on payment of costs at the discretion of the court, and a reasonable time shall be given to the defendant to answer such new counts."

Afterwards in the revision of 1875, in said statutes, p. 426, chapter 8, sect. 1, the right to amend was further extended as follows:

"The plaintiff may amend any defect, mistake, or informality in the suit, citation, declaration, or petition *not changing the form or ground of the action* or insert new counts in his declaration for the same cause of action as that declared upon in any of the original counts.

"And in any form of action, counts in which might have been originally inserted in the declaration."

It would seem that the last addition to our statutes was intended to extend the right to amend so as to allow the insertion by way of amendment of any new count which might have been inserted in the original declaration.

The only doubt as to the effect of this last alteration of the statute arises from its wording, which is that the plaintiff may insert "counts *in* which might have been originally inserted," etc. It is evident that the word "in" is a misprint, or it was intended to say that by amendment the plaintiff might insert, "counts in *the declaration which* might have been inserted in the original declaration," etc.

The statutes of Connecticut therefore establish three rules:

1st. The law prior to 1855 authorized any amendment not changing the form or ground of action.

2d. After 1855, till the revision of 1875, any amendment, by inserting new counts for the same cause of action as that declared upon in any original counts.

3d. After 1875, any amendment, by inserting any new count which might have been inserted in the original declaration.

This amendment was made and allowed at the April Term A.D. 1876, after the revision of 1875.

The decisions in Connecticut relating to the power of the court to make amendments have been under the law as it stood prior to the revision of 1875, and they all hold that the statute is to be most liberally construed.

Nash *vs.* Adams et al., 24 Conn., 33.

The amendment in this case was allowed in 1851, and the decision of the Supreme Court was in 1855. In the original declaration the defendants were charged as carriers from Norwich to Philadelphia. Also as bailees of the property lost.

New counts by way of amendment were allowed—one charging the defendants as common carriers from San Francisco to New York; another from San Francisco to Norwich, and in another from New York to Norwich.

The court say:

"The phrase 'ground of action' is not used in this statute in any technical or narrow sense, but was intended to refer rather to the real object of the plaintiff in bringing the suit; and such a construction has always been given to it as would further that object. The face of the declaration merely, therefore, has never been held to determine whether it may be amended, the form of the action being preserved; but courts, in deciding upon the admissibility and propriety of an amendment, have uniformly, and, we think, properly looked also at the extrinsic circumstances of the case, with a view of ascertaining the real purpose for which the suit was brought."

So in Spencer *vs.* House, 26 Conn., 200, decided in 1857, the court held—

That "an amendment of a declaration in an action for a breach of a covenant against incumbrances by which a new count is added, setting forth a new and distinct incumbrance, is not objectionable as changing the ground of the action within the meaning of the statute which allows amendments that do not change the form or ground of the action."

In Beers *vs.* The Woodruff & Beach Iron Works, 30 Conn., 308, decided in 1862:

The original declaration contained a count for false warranty of a boiler, and one for fraud in the manufacture and sale of it. Held it could be amended by adding a count for negligence in the manufacture of it.

The court say, "It appears to us, therefore, that the amendment was justified by the liberal construction which our modern decisions have very properly given to our statute on this subject."

In Church *vs.* Syracuse Coal and Salt Co., 32 Conn., 372, decided in 1865, the original declaration alleged a false warranty of the value of a river landing, by which the plaintiff was induced to purchase a lease of it from defendants; the plaintiff was allowed to amend by inserting averments that a quantity of coal was covered by the same warranty and embraced in the same sale; also a new count alleging that by fraudulent representations of the value of the landing and the character of the coal, the plaintiffs were induced to purchase. It was held that the amendments did not change the "ground of the action" within the meaning of the statute. The court say, see page 377, "In effect the amendment undoubtedly enlarges the issue and lays the foundation for other and further evidence and the recovery of greater damages, but that is immaterial."

In Barber *vs.* Barber, 33 Conn., 335, decided in 1866, which was an action of slander, in the original declaration the slanderous charge was that the plaintiff was a prostitute. It was amended by adding counts alleging the utterance, at other times, of other slanderous words of the same general character. Held that the amendment did not change the "ground of the action," and was properly allowed.

In Bulkley *vs.* Andrews, 39 Conn., 523, decided in 1873, the original declaration contained a single count in general

assumpsit. After a trial in which it was held that general assumpsit would not lie, the declaration was amended by adding three special counts, charging the defendant with having received goods under a special contract to re-deliver, and the court say, page 535, "He moved for leave to amend, and the amendment was allowed, as we think, properly. The question was within the jurisdiction of the court, and the amendment changed neither the form nor the ground of the action. The purpose of a statute of amendment is a beneficial one, and it has continually been more and more liberally expounded.

"Nash *vs.* Adams, 24 Conn., 33.

"Stuart *vs.* Corning, 32 Conn., 105.

"Besides the allowance of this motion was within the discretionary power of the court, and is not the subject of error:

"Merriam *vs.* Langdon, 10 Conn., 460.

"Husted *vs.* Greenwich, 11 *ib.*, 383,

and as to the time when amendments may be made, it is a matter of practice and not in the discretion of the court.

"McAllister *vs.* Clark, 33 Conn., 253."

In Howland *vs.* Couch, 43 Conn., 47, decided in 1875, the original action was assumpsit upon the common counts, tried in the Court of Common Pleas upon the following bill of particulars:

"1874, June. To cash, $10; one wagon, $40; work, $5; money had and received, $35 = $90."

The plaintiff amended his declaration by filing additional counts setting out that the plaintiff had contracted to exchange with the defendant a wagon for a horse and the sum of ten dollars, and alleging that the defendant had refused to deliver the horse or the ten dollars. The Supreme Court sustained these amendments, and the court say, on page 52, "The second question is whether the amendment as actually made is allowable. The form of the action is preserved, but it is claimed that the 'ground of action' is different. And here we recur again to the liberal construction which our courts

have always given to the statute, with a view to furnish every possible facility to reach the real merits of the entire controversy between the parties, and 'to prevent the plaintiff from being put to a new action, where, by accident, mistake, or inadvertence, or even by carelessness, he has made a formal slip, or misdescribed the facts of his case.'

"Nash *vs.* Adams, 24 Conn., 38.

"'The phrase 'ground of action,' therefore, is not to be construed in its technical sense, but it is held to refer rather to the real object of the plaintiff in bringing the suit,' which is to be determined not merely by the face of the declaration, but also by the extrinsic circumstances of the case."

The above authorities fully justify the amendment in this case as not having changed the "ground of action," under the liberal construction which has been given to the Connecticut statute. It will not be claimed that the form of the action is changed by the insertion of the new count, or that the new count is one which might not originally have been inserted in the declaration. Therefore if we are right in our construction of the statute of 1875, the amendment is one which we had a right to make and the court to allow, independent of the decisions which we have cited.

The only other assignment of error is that the court erred in allowing a certain question to be put to and answered by D. B. Smith, the surviving member of the firm of D. B. Smith & Co., relating to a letter written by said firm, dated Feb. 13, 1867 (see Record, page 16).

In order that the court may judge of the effect and admissibility of the testimony, it may be necessary to ascertain the precise issue presented to which the testimony was applicable.

It will be seen by the record that the parties were at issue

upon the question whether the plaintiffs had furnished yarn of the requisite fineness, No. 24, as provided in the contract.

On page 12 of the Record it appears that "for the amount of money due to the plaintiffs for the manufactured yarn at 30 cents per pound, as shown by their accounts, they drew upon the defendants monthly. These drafts were uniformly paid until the draft for the month of December, 1866, the last month of the contract. Their account for this month shows that they had manufactured 11,270¾ pounds of yarn, upon which was due $3,381 $\frac{23}{100}$, and also that they had furnished over and above the amount received from the defendants 3,649 pounds of cotton during the last two months, which amounted to $1,258.91. These two amounts were not paid, but were justly due to the plaintiffs with interest, unless the matters set up in defence constituted a just defense. The defendants did not deny that said amount of yarn was manufactured, and said excess of cotton was furnished by the plaintiffs.

"After the contract was closed the plaintiffs brought an action of general assumpsit against the defendants, and furnished to them a bill of particulars hereto annexed, claiming the said two items and an item of $3.47 for freight, and an item of $25.00 for expenses to Newburgh, which last mentioned two items were not disputed on the trial, and also claiming an item of $157.30 for unreturned bags which contained the yarn sent to New York, and also an item of $5,413.14 for cotton furnished by plaintiffs during the year 1866, and manufactured into yarn in order to supply a deficiency which would otherwise have existed, in consequence of the waste occasioned by poor cotton which had been furnished by the defendants, and which poor cotton in consequence of its defects was unfit to be manufactured into yarn, without creating a great excess of waste above 16 per cent. This additional cotton they claimed to recover for by reason of an agreement made to that effect by the defendants."

Then follows the bill of particulars, which it is unnecessary to set out.

On page 14 of the Record it appears that "the plaintiffs offered evidence tending to show that the yarn was fully equal to number 24, especially the said 42,834 pounds; that in the earlier part of the time covered by the contract they were requested by the defendants, as their business was driving, and they could use all the yarn that they could buy, to send them whatever yarn they (the plaintiffs) could manufacture, although not as fine as number 24; that if any yarn was sent below number 24 it was well known to the defendants, who accepted the same with knowledge of its defects."

So in page 17 of the Record it appears that "the jury were then instructed that any and all questions in regard to the acceptance, by a retention without examination or neglect or delay to examine, might be laid out of the case as immaterial, for the plaintiffs had waived this question of fact, and had placed their ca e entirely upon two grounds: 1st, that the goods were free from defects, and were made in compliance with the contract; and 2d, That if there were any defects, that the defendants had accepted the goods with full actual knowledge of the defects, and that to these two questions only the jury were to direct their attention, and consideration of other questions was withdrawn. And if they found that the yarn was not number 24, and had not been accepted with knowledge that it was below 24, then the rule of damages was given by which they were to be guided."

So it fully appears that the material question before the court and jury was, whether the 42,834 pounds was equal to number 24 or not.

It appears by page 14 of the Record, that "the following letters were introduced in evidence by the defendants for the purpose of showing that the plaintiffs, by their letter of February 13, 1867, admitted the claim of the defendants in regard to the size of the yarn."

Then follow four letters written by the defendants to the plaintiffs (all written after the last yarn was furnished), the first dated Jan. 23, 1867 (in the record it is by mistake dated

July 23, 1867); the second dated Jan. 31, 1867; the third dated Feb. 6, 1867, and the last dated Feb. 27, 1867. In these letters the defendants claim that the plaintiffs have not complied with their contract, but made their yarn coarser than number 24; and in the letter of February 6th they say: "It makes it very bad for us, and we think you should allow us at least five cents per pound. We would not purchase that number for ten cents per pound less for our use." And in the letter of February 27th they say, "We find we have of yarn made by you on hand 242 bags—42,834 pounds." . . . "We think to make us as we remarked to you before." . . . "We would not purchase for our use the sized yarn you sent us and give as much into 10 cents per pound as we would give for full No. 24. We hope you will see that we wish to do what is right and just with you, and under the circumstances be as liberal toward you as possible."

They also introduced a letter from the plaintiffs, written in reply to the last letter sent by the defendants, in which the plaintiffs say: "Yours of the 27th inst. is at hand, claiming damages of 5 cents per pound on 42,834 pounds, which we deduct from the bill, &c." In this letter was enclosed a bill dated February 13, 1867, in which the plaintiffs entered a credit in the following words: "Less damages claimed, $2,141.70."

It also appears on page 16 of the Record that "the plaintiffs, for the purpose of rebutting any alleged admissions contained in the letter of February 13th, called upon the defendants to produce the plaintiffs' letters, written in reply to the said letters of the defendants. Said letters not having been produced, and having been mislaid or lost, and no copies having been kept by the plaintiffs, they gave parol evidence of their contents, *the substance of which was a denial of the assertion of the defendants that the yarn was below number* 24, *and a recital of the tests which the plaintiffs had made to prove that it was equal to that number.*

"Upon the examination of D. B. Smith, the surviving member of the plaintiffs' firm, and the writer of the letter of February 13, 1867, he was asked by his counsel whether he

intended, in and by said letter, to admit that the defendants' claim for damages was valid, and that the yarn was below No. 24, to which question the counsel for the defendant objected, which objection was sustained by the court.

"The court then permitted the witness, against the objection of the defendants, to be asked whether his acceptance of the defendants' proposition to deduct five cents per pound from the 42,834 pounds was because he admitted that the yarn was not according to contract, or to settle a controversy.

"No objection was made to the form of this question, but its admission was objected to upon the ground that said letter must explain itself. To the ruling of the court overruling said objection, the counsel for defendants then and there excepted.

"The witness replied that he accepted the proposition because he did not wish to be obliged to commence a law-suit in New York City, and endure the expenses of a trial in the courts of that State.

"The plaintiffs offered evidence tending to prove that defendants did not pay the draft named in said letter of Feb. 13, and afterwards demanded the same reduction upon all the yarn which had been previously manufactured and delivered to them."

The only objection to the question was that the letter must explain itself.

Our answer is, it did explain itself, and the question asked and answered did not in the slightest degree add to, vary, or change in any particular the language of the letter. That the defendants *claimed* that the plaintiffs had violated their contract and asked a reduction of five cents per pound therefor, and that the plaintiffs agreed to accept this proposition of the defendants as they understood it, is not questioned, but the defendants' claim is that this acceptance by the plaintiffs of this offer of the defendants is presumptive evidence that the plaintiffs admitted that they had not fulfilled their contract. On the other hand, the plaintiffs claim that their ac-

ceptance of the offer of the defendants, especially in view of the fact that they were strenuously denying that they had violated their contract, was presumptive evidence, not that they admitted a breach of the contract, but that they accepted the proposition to avoid the expense of litigation. Either presumption is entirely consistent with the language of the letter and will fully explain the intent of the writer. If the intent of the writer is doubtful, there is no rule of law which will exclude evidence showing what the intent of the writer was in fact.

Whether this case is to be regarded as a case of latent ambiguity, or an attempt to raise a presumption from certain facts proved, the evidence was clearly admissible.

In a case of latent ambiguity, parol evidence is always admissible to remove the ambiguity. Where a presumption is attempted to be raised from certain facts proved, it is always admissible to show that the circumstances are such that the presumption claimed is unfounded.

1 Greenl. Ev., section 296.

"Where a certain presumption would in general be deduced from the nature of an act, such presumption may be repelled by extrinsic evidence showing the intention to be otherwise."

So as to the rule that parol evidence is inadmissible to contradict or vary the terms of a valid, written instrument. 1 Greenleaf Ev., section 287. "It is to be observed that the rule is directed only against the admission of any other evidence of *the language* employed by the parties in making the contract than that which is furnished by the writing itself. The writing, it is true, may be read by the light of surrounding circumstances in order more perfectly to understand the intent and meaning of the parties; but as they have constituted the writing to be the only outward and visible expression of their meaning, no other words are to be added to it or substituted in its stead."

So again in section 282, Greenleaf says, "The rule excludes only parol evidence of the language of the parties contradicting, varying, or adding to that which is contained in the written instrument."

In this case no attempt was made to contradict, vary, or add to what was contained in the letter.

In Price *vs.* Mowat, 11 C. B. N. S., 508, it was held that where a plaintiff had been engaged for three years at a salary and to give the whole of his service, it was competent to prove by parol in what capacity he was employed, to wit, that of a "lace buyer."

So in Bradley *vs.* Steam Packet Co., 13 Peters, 89, where a steamboat had been hired until another then building should be prepared and put on the route, parol evidence was allowed to show the purpose for which the steamboat was employed, and to show that it was only to be so employed while navigation was open.

In Knight *vs.* New England Worsted Co., 2 Cush., 271, Chief Justice Shaw, in giving the opinion of the court, says: "In expounding a written contract, although parol evidence is not admissible to prove that other terms were agreed to which are not expressed in the writing, or that the parties had other intentions than those to be inferred from it, yet it is competent to offer parol evidence to prove facts and circumstances respecting the relations of the parties, the nature, quality, and condition of the real and personal property which constitute the subject matter respecting which it is made. It is also competent to prove by parol evidence—indeed, it can hardly be done by any other—the acts of the parties at and subsequent to the date of the contract as a means of showing their own understanding of its terms."

In Stoops *vs.* Smith, 100 Mass., 63, in an action on a written agreement to pay the plaintiff "fifty dollars for inserting business card in two hundred copies of his advertising chart, to be paid when the chart is published," parol evidence was held to be admissible, for the interpretation of the contract and its application to the subject matter, showing that at the time of the making of the agreement the plaintiff represented and promised that his advertising chart should be composed of certain material and be published in a certain manner.

So in Thorington *vs.* Smith, 8 Wallace, 1. This court held that a contract made in the Confederate States during the Rebellion, to pay in "dollars," might be shown by parol to mean Confederate dollars.

But we claim in this case that the acceptance of the offer made by the defendants, as understood by the plaintiffs, was an offer of compromise, and that the plaintiffs might have insisted that the evidence should not be admitted at all, but if the letters are admitted, they clearly have a right to show the fact that they accepted the proposition as a compromise, leaving it for the jury to determine what weight, if any, should be given to their acceptance of the offer.

In 1 Phillips on Ev., 4th Am. Ed., with Cowen & Hills' notes, page 427, note 124, it is said, "In general, however, both in England and America the nature of the negotiation has been looked to, and that the offer was intended to be without prejudice has been inferred from its being plainly an offer with a view to compromise. As observed by a learned judge [Mills *J.*], offers of sums, prices, or payments made during an attempt to compromise are not admissible if not accepted."

In Wayman *vs.* Hilliard, 7 Bing., 101, "Plaintiff demanded £40 upon an agreement by defendant, an incoming tenant, to pay for growing crops. The defendant offered to pay £17. Held no evidence to support a count upon an account stated."

Bosanquet, *J.*, says, "There has been no acknowledgment of debt here. The defendant merely makes an offer to purchase peace."

Sanborn *vs.* Neilson, 4 N. H., 501. Richardson, *C. J.*, in giving the opinion of the court on page 509, uses this language: "The reason why a mere offer of money or other thing by way of compromise is not to be evidence against him who makes it, is very plain and easily understood—such an offer neither admits nor ascertains any debt, and is no more than saying that so much will be given to be rid of the controversy."

In Jones *vs.* Foxall, 13 Eng. Law and Eq., 145, the Master of the Rolls, Sir John Romilly, uses the following language: "But in addition to this I find the offers were made without prejudice to the rights of any parties, and I shall, so far as I am able, in all cases endeavor to suppress a practice which, when I was first acquainted with the profession, was rarely if ever ventured upon, but which, according to my experience, has been common of late, namely, that of attempting to convert offers of compromise into admissions and acts prejudicial to the parties making them. If this were permitted the effect would be that no attempt to compromise a suit would ever be made."

In Lawrence *vs.* Hopkins, 13 Johns., 288, the suit was upon a note for $152.52. Plea statute of Limitations. Plaintiff offered evidence that defendant had offered $25 in settlement of the note. The court say, "To infer a promise to pay in direct opposition to the defendant's denial of the justice and fairness of the debt would be trifling with the statute. The

proposition to give $25 to settle the demand must be laid out of the case, because that was a mere peace offering, and being rejected it cannot prejudice the defendant."

Murray *vs.* Coster, 4 Cowen, 617, on page 635, the court say, "That no advantage shall be taken of offers made by way of compromise; that a party may with impunity attempt to buy his peace are well established rules of law to which our reason and our feelings at once assent."

In Jardine *vs.* Sheridan, 2 Car. & Kir. N. P., 24, a witness was called who stated that he went to the defendants' attorney with the object of obtaining a compromise. Tindal, C. J., held that "if what he said was said with a wish of effecting it, I think it must be considered that all that passed was privileged as negotiation to bring about a compromise."

The same doctrine is laid down in Gerrish *vs.* Sweetser, 4 Pick., 374.

Hartford Bridge Co. *vs.* Granger, 4 Conn., 142, Chief Justice Hosmer, in giving the opinion of the court, on page 148 uses the following language: "The law on this subject has often been misconceived, and it is time that it should be firmly established. It is never the intendment of the law to shut out the truth, but to repel any inference which may arise from a proposition made not with design to admit the existof a fact, but merely to buy one's peace. If an admission, however, is made because it is a fact, the evidence to prove it is competent, whatever motive may have prompted to the declaration. In illustration of this remark it may be observed that if A offer to B ten pounds in satisfaction of his claim of a hundred pounds merely to prevent a suit or purchase tranquility, this implies no admission that any sum is due, and therefore testimony to prove the fact must be rejected because